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No. 00–596

IN THE

Supreme Court of the United States

LORILLARD TOBACCO COMPANY, *et al.*,

Petitioners,

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF MASSACHUSETTS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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I. The Massachusetts Regulations Are Preempted

Respondent's preemption arguments are unsupported by the text of FCLAA, fail to explain the 1969 amendments expanding § 5(b), and ignore legislative history showing that § 5(b) was intended to apply to local advertising bans.

1. Respondent declines to defend the First Circuit's holding that restrictions on the display of tobacco advertising "[do] not impose obligations 'with respect to' advertising" under FCLAA. Pet. App. 10a (citation omitted). Instead, Respondent attempts to ground a content/location distinction in the "based on smoking and health" clause. The Government and virtually all of the *amici* take the same approach; indeed, the Government explicitly disavows any reliance upon the Court of Appeals' construction of the "with respect to . . . advertising" clause. U.S. Br. 18 n.7. Respondent and his *amici* thus effectively concede that the First Circuit erred in its resolution of the first question presented by the Petition.

2. The effort to ground a content/location distinction in the "based on smoking and health" clause is likewise unavailing; indeed, the Second Circuit correctly labeled it "sophistry." *Greater N.Y. Metro. Food Council v. Giuliani*, 195 F.3d 100, 108 (2d Cir. 1999). The plain language of the clause includes *all* state law duties that are "based on smoking and health," whether in purpose or in effect.

a. Respondent concedes that the regulations are based on "health concerns" about tobacco, *see* Resp. Br. 21 n.10; *see also* J.A. 248-52, but he contends that the regulations are nonetheless not "based on smoking and health" because they are *also* "based upon" other concerns. Resp. Br. 20. The First Circuit properly rejected this argument, Pet. App. 13a n.6, which is inconsistent with the text of § 5(b). A regulation does not cease to be "based on smoking and health" simply because it is also based on something else. *See, e.g., Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 106 (1992) ("Our

precedents leave no doubt that a dual impact state regulation cannot avoid OSH Act pre-emption simply because the regulation serves several objectives rather than one."). There are few, if any, regulations that could not be said to serve more than one purpose; Respondent's exclusion of dual-purpose regulations from § 5(b) would therefore gut the provision. *Id.* (where preemption is defined partly by purpose, States cannot evade preemption "'simply by publishing a legislative committee report articulating some state interest or policy — other than frustration of the federal objective'") (citation omitted).

Respondent also contends that the regulations are not "based on smoking and health" because they were promulgated pursuant to "the general proscription on unfair practices under the Massachusetts Consumer Protection Act." Resp. Br. 25. The Court in *Cipollone* explicitly rejected the notion that the basis of a state law duty could be analyzed at such a high level of generality. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 530 n.27 (1992) (plurality); *id.* at 553 (Scalia, J., joined by Thomas, J.) (such an approach "would gut the statute"). That the regulations were issued under a generic statute does not change the fact that they target cigarette advertising "based on" the health risks of smoking.[1]

b. The Government contends that § 5(b) preemption is limited to state laws whose *operation* is "based on" smoking and health and does not include laws whose *purpose* is "based on" smoking and health. U.S. Br. 9, 11. This argument fails

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[1] Respondent's argument also overlooks the fact that *Cipollone* examined the "level of generality" of a state law duty *only* in the context of analyzing state *common law* theories. Of course, the relevant common law rules had not been *adopted* "based on smoking and health," and the Court therefore necessarily analyzed the issue in terms of whether the theories invoked were, *in their operation*, "based on smoking and health." *See, e.g.*, 505 U.S. at 524 ("failure to warn" claim was preempted because it required showing that cigarette advertising "should have included additional, or more clearly stated, warnings"); *id.* at 554 (Scalia, J.).

on its own terms: the challenged regulations "operate" based on smoking and health because, by *specifically* prohibiting outdoor tobacco advertising, they directly and substantially eliminate the public display of federally prescribed warning labels. *Cf.* AMA Br. 9 n.3 (total bans "obviously affect advertising content by eradicating it altogether"). More fundamentally, the argument that § 5(b) only preempts regulations that *operate* based on smoking and health cannot be reconciled with the statutory text.

Nothing in the text supports the Government's effort to read § 5(b) as excluding consideration of the purposes that underlie a regulation. In common parlance, "based on" includes "what *underlies* a belief, a system of thought, a judgment, a hope, and so on." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 181 (1968) (usage note) (emphasis added). This common understanding is reflected in Respondent's Brief, which (unlike the Government's Brief) uses "based on" in a motivational sense: Respondent defends the regulations on the ground that they are "based upon" various substantial interests in addition to the health effects of smoking. *See supra* at 1-2. The Government's attempt to rewrite § 5(b) as if it applied only to "requirement[s] or prohibition[s] *which operate* based on smoking and health" violates the settled rule that the courts may not add limiting terms that Congress has not included. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 169 (1993).

The Government also speculates that, had Congress intended to preempt obligations whose *purpose* is "based on smoking and health," it would "probably" have used "because of" rather than "based on." U.S. Br. 10. But the Government cites no authority for its dubious premise that Congress uses the phrases "based on" and "because of" as having significantly different meanings. Indeed, quite the opposite appears true.

Cf. 42 U.S.C. § 2000e(k) (Title VII) (using "because of" and "on the basis of" interchangeably).[2]

The Government argues that the phrase "based on smoking and health" becomes surplusage if it is read to include tobacco-specific obligations adopted *because of* smoking and health. U.S. Br. 11; *see also* Resp. Br. 21. That is wrong. Not every tobacco-specific regulation is motivated by health-related concerns, as a quick glance at the code books confirms. *See, e.g.*, Mass. Gen. Laws, ch. 64C, § 14 (making it unlawful to advertise cigarettes at less than cost if done "with intent to injure competitors"). Moreover, "based on smoking and health" is hardly surplusage; its elimination would dramatically expand § 5(b) to prevent *any* state law "with respect to advertising or promotion" from being applied to cigarettes. *Cf. Medtronic, Inc. v. Lohr*, 518 U.S. 470, 488 (1996).[3]

3. The constructions of § 5(b) urged by Respondent and his *amici* also fail to give effect to the 1969 amendments.

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[2] The Government also contends that, if Congress had meant to refer to underlying purposes, it would have placed the phrase "based on smoking and health" after the word "imposed." U.S. Br. 10. This argument misunderstands Petitioners' position. The Government's alternative phrasing would dramatically narrow the statute to cover *only* obligations that are "based on" smoking and health in a motivational sense; Petitioners' point is that the language Congress chose covers *all* obligations "based on" smoking and health, whether in purpose *or* in effect.

[3] The Government is likewise wrong in contending that an operational limitation is necessary to avoid difficult inquiries into subjective motive. U.S. Br. 11. It is not unusual for Congress to adopt a preemption provision that takes motivation into account. *See, e.g., Gade*, 505 U.S. at 105 ("[P]art of the pre-empted field is defined by reference to the purpose of the state law in question, . . . another part . . . by the state law's actual effect.") (citation omitted). And to the extent that the health-based nature of the regulation is not already apparent on the law's face, the record is likely to be (as here) "replete" with such references. *See, e.g., Greater N.Y. Food Council*, 195 F.3d at 108.

a. Two changes in the 1969 amendments made the preemption of state law "much broader": (1) the new § 5(b) "bars not simply 'statement[s]' but rather 'requirement[s] or prohibition[s]'"; and (2) the amended provision "reaches beyond statements '*in* the advertising' to obligations '*with respect to* the advertising or promotion' of cigarettes." *Cipollone*, 505 U.S. at 520 (plurality) (emphasis added). Respondent acknowledges the first change, conceding that the 1969 Act "enlarged the *forms* of state law" that were preempted to include not just statutes and regulations, but also state common law. Resp. Br. 26 n.13. Respondent denies, however, that the second change had any effect, insisting that "the 1969 amendments to § 5(b) did not expand the *substantive* scope of preemption." *Id.* Respondent's failure to give effect to this "substantial difference[] in language," *Cipollone*, 505 U.S. at 520 (plurality), violates the settled rule "requiring a change in language to be read, if possible, to have some effect." *American Nat'l Red Cross v. S.G.*, 505 U.S. 247, 263 (1992).

Respondent and his *amici* rely on *Cipollone*'s observation that "the phrase 'relating to smoking and health' . . . was essentially unchanged by the 1969 Act." 505 U.S. at 529 (plurality); Resp. Br. 26; U.S. Br. 15-16. But while Congress did not materially alter what is now the "based on smoking and health" clause, it did substantially alter the phrase that this clause modifies: the Act's preemption is no longer limited to "*statement[s]* relating to smoking and health . . . *in the advertising*" of cigarettes, but now extends to "*requirement[s] or prohibition[s]* based on smoking and health . . . *with respect to the advertising or promotion*" of cigarettes. *Compare* Pub. L. No. 89-92, § 5(b), 79 Stat. 282, 283 (1965) *with* Pub. L. No. 91-222, § 2, 84 Stat. 87, 88 (1970) (emphases added). Had Congress intended § 5(b) to remain limited to content regulation, there would have been no need to make this significant change.

Neither Respondent nor his *amici* have come up with *any* plausible explanation for this amendment. The answer suggested by the text is fatal to their position: by adding the word "prohibition" and changing the phrase "in the advertising" to "with respect to the advertising," Congress altered the language of § 5(b) so that it now covers health-based *bans* on advertising.

b. The legislative history of the 1969 amendments confirms this reading of § 5(b).

There had been substantial debate whether the 1965 version of § 5(b) (which applied both to federal agencies and to the States) preempted a *prohibition* of advertising in specified media or locations. The FCC Chairman testified that the old § 5(b) precluded the agency from adopting a television ban, *see, e.g., Cigarette Labeling and Advertising — 1969, Hearings Before the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 214 (1969) ("House Hearings"), but the D.C. Circuit, in upholding application of the "fairness doctrine" to cigarette advertising, suggested that the provision reached only required additional *statements*. *Banzhaf v. FCC*, 405 F.2d 1082, 1090 (D.C. Cir. 1968). When California was considering a ban in 1969 on both *cigarette billboards* and in-state television advertising, the state Attorney General's office opined that the proposal would violate the old § 5(b), *see* Letter from Cal. Dep. Atty. Gen. J. Frazier to Cal. Sen. J. McCarthy 2-7 (July 11, 1969) (Lodging 15-20), but the California Legislative Counsel's office took the opposite view, *see* Letter from Cal. Dep. Legis. Counsel E. Bershatsky to Cal. Sen. A. Beilenson 4-7 (Apr. 21, 1969) (Lodging 6-9). Nor was California alone in considering prohibitions on cigarette advertising: a proposal in the New York City Council in 1969 would have made it illegal to display in any "place of public assembly or public conveyance, any matter or material which encourages cigarette smoking." *See* N.Y. City Bill No. 987, § 1 (Apr. 24, 1969) (Lodging 30-31).

Although the House Report acknowledged the conflict of opinion, H.R. Rep. No. 91-289, at 3-5 (1969), the House version of the 1969 Act would have left the preemption language *verbatim* unchanged. The Senate was apparently unwilling to perpetuate this confusion. During Senate hearings, the major cigarette manufacturers expressed their willingness to cease all television and radio advertising, thereby mooting any further need to preempt the FCC. *See Cigarette Advertising and Labeling: Hearing Before the Consumer Subcomm., Commerce Comm., U.S. Senate*, 91st Cong., 103 (1969) ("Senate Hearings"). In analyzing what should then be done with the preemption provision, Senator Magnuson, the chairman of the Senate Commerce Committee, engaged in an extended colloquy with a tobacco industry representative who specifically urged that the FCLAA should preempt laws "banning cigarette advertising in a particular locality." *Id.* at 102. Senator Magnuson agreed with the witness that "you make a point" as to "what we do with the preemption clause as the House passed it," and he specifically stated that, among the sorts of local regulations that could lead to "chaos" were advertising bans *such as those proposed in California and New York City*. *Id.*

The subsequent amendments made by the Senate Committee resolved the question whether bans would be preempted.[4] The Committee removed the preemption of the FCC, added a statutory prohibition on cigarette advertising in television and radio, and added a new provision that temporarily barred the FTC from requiring warnings in cigarette advertising. With the federal agencies thus covered, § 5(b) preemption was limited only to the States, but its scope was expanded specifically to include "prohibitions" and to reach, not just required

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[4] In this sense, the Senate amendments "clarified" the preemption provision. S. Rep. No. 91-566 at 12. The argument that the 1969 Amendment "*merely* 'clarified'" § 5(b) without altering its substantive sweep was explicitly rejected in *Cipollone*. 505 U.S. at 520 (plurality).

"statements . . . in advertising," but also "prohibitions . . . with respect to" advertising. 115 Cong. Rec. 38732 (1969). The Senate Report confirmed that these changes to § 5(b) were intended, *inter alia*, to preempt "health-related . . . prohibition of cigarette advertising by any State or local authority." 1970 U.S.C.C.A.N. 2652, 2652.[5] *See Cipollone*, 505 U.S. at 539 (Blackmun, J., joined by Kennedy and Souter, JJ.) (purpose was "to ensure that a State could not do through negative mandate (*e.g.*, banning all cigarette advertising) that which it already was forbidden to do through positive mandate").

4. Respondent is wrong in contending that Massachusetts' near-total ban on outdoor advertising does not interfere with the purposes of the Act. The "comprehensive Federal program" described in § 2, *see* 15 U.S.C. § 1331, is undermined not merely by state laws that seek to change or add to the federal warning, but also by "diverse, nonuniform" state regulations that implicitly deem the federal warning inadequate by *banning* cigarette advertising. *See Cipollone*, 505 U.S. at 539 (Blackmun, J.). Indeed, that comprehensive program itself includes its own *ban* (on television and radio). And *Cipollone* held that the leftover hortatory language of § 2 (unchanged by the 1969 Act) is *not* a "sufficient basis for rejecting the plain meaning of the broad language that Congress added." *Id.* at 521 n.19 (plurality).

5. Respondent's reliance on a "presumption against preemption" is unavailing. The text and legislative history confirm that Congress *did* in fact intend to limit the State's ability to enact health-based regulations of cigarette advertising. Accordingly, the Court's "task is simply to ascertain the fair meaning" of the statutory terms. *Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214,

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[5] Respondent relies on the absence of explicit mention in the legislative history of a Utah statute making it unlawful to display cigarette advertising. But this "dog that didn't bark" theory is unavailing when the legislative history clearly reveals that other dogs *did* bark.

224 (1992); *see also Egelhoff v. Egelhoff*, 121 S. Ct. 1322, 1330 (2001). Moreover, the alleged encroachment on the State's police powers is overstated: "zoning" interests can be "adequately address[ed]" by "[g]enerally applicable laws" that are not based on smoking and health in purpose or effect. Resp. Br. 21. Respondent concedes that the reason for singling out tobacco advertising is the "grave health consequences of cigarettes," *id.*, but that is the field Congress occupied in § 5(b).

There is likewise no merit to Respondent's suggestion that a plain language reading of § 5(b) "would grant cigarette manufacturers the right to advertise in any location, in any community." Resp. Br. 17. The suggestion is particularly ludicrous as applied to these Petitioners, whose advertising is already severely restricted by the MSA. JA 259-71. In any event, cigarette advertising, as noted, remains subject to generally applicable zoning restrictions. In addition, given that § 5(b) permits States to ban *sales* to minors, it presumably permits them to ban deliberate conspiracies, knowing attempts, and direct and intentional solicitation of such unlawful sales. This is sufficient to rebut the parade of horribles recited in the briefs of Respondent and his *amici*. In any event, as this Court observed in rejecting a similar argument in the context of preemption of state regulation of airlines, the federal Government retains sufficient authority in this area. *Morales v. Trans World Airlines*, 504 U.S. 374, 390-91 (1992).

II. The Regulations Violate the First Amendment[6]

A. Strict Scrutiny Applies

This case underscores the inherent limitations of *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S.

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[6] Even if the preemption issue is resolved in Petitioners' favor, the Court must resolve the First Amendment issue because it is the only issue in No. 00-597. *Compare Ashwander v. TVA*, 287 U.S. 297, 347 (1936) (Brandeis, J., concurring).

557 (1980). The malleability of intermediate scrutiny is, as several members of the Court have suggested, not well suited to the review of regulations that deliberately suppress truthful commercial speech based on its message. *See, e.g.*, 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501-03 (1996) (plurality). Application of a "balancing test" in such a case inevitably descends into subjective judgments about the value of the ideas expressed — a point the opinions below make painfully clear. *See, e.g.*, Pet. App. 66a-67a (suggesting that the level of First Amendment protection for commercial speech varies depending upon whether the product is "socially- or politically- important"). This inherently subjective approach contradicts basic First Amendment principles.

Respondent effectively concedes that strict scrutiny applies to content-based commercial speech restrictions that do *not* regulate the "characteristics of commercial speech that justif[y] depriving if it of full First Amendment protection." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992); *44 Liquormart*, 517 U.S. at 499 (plurality). Instead, Respondent asserts that his regulations make an "appropriate content distinction." Resp. Br. 31 n.15. But that is wrong. By banning *all* outdoor commercial speech expressing *any* favorable idea about tobacco in up to 91% of the State's major cities (not to mention the further restrictions on in-store advertising), the regulations make precisely the sort of distinction to which strict scrutiny should apply. This Court's cases make clear that where a State suppresses a substantial amount of speech directed to *adults* and the applicability of the regulations turns solely on the *ideas* expressed, strict scrutiny applies — even if the State's purpose is to shield children. That general principle applies with full force to regulations that suppress nonmisleading *commercial* speech aimed at adults based on its message: such regulations "are clearly directed not at any commercial aspect of the prohibited advertising but at the ideas conveyed and form of expression — the core of First Amendment

values." *Carey v. Population Services, Int'l*, 431 U.S. 678, 702 n.28 (1977).

1. This Court has held that, even when government tries to shield children from age-inappropriate speech (*e.g.*, indecent speech), content-based regulations that suppress a substantial amount of otherwise lawful adult speech are subject to strict scrutiny. "[E]ven where speech is indecent and enters the home, the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative." *United States v. Playboy Entm't Group*, 529 U.S. 803, 814 (2000). In *Reno v. ACLU*, 521 U.S. 844, 874 (1997), the Court applied strict scrutiny to the Communications Decency Act because "[i]n order to deny minors access to potentially harmful speech, the [Act] effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another."

Notwithstanding the substantial interest in protecting children from indecent speech, the Court applied strict scrutiny in these cases because content-based suppression of speech aimed at adults creates the risk that the government may be attempting "to silence dissenting ideas." *Playboy*, 529 U.S. at 818. That rationale applies with full force here. A regulation that suppresses a large amount of truthful commercial speech to adults, and that does so based on the ideas expressed, "raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." *R.A.V.*, 505 U.S. at 387 (citation omitted) (extending this principle to *unprotected* speech); *see also 44 Liquormart*, 517 U.S. at 501 ("Our commercial speech cases have recognized the dangers that attend governmental attempts to single out certain messages for suppression.").

Respondent contends that (despite Massachusetts' self-proclaimed "war on Big Tobacco," JA 248) any concern about censorship is misplaced because the State merely "seeks to

address a harm." Resp. Br. 33. But good intentions do not dispel the "possibility that official suppression of ideas is afoot." *R.A.V.*, 505 U.S. at 390. "'Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment.'" *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991) (citation omitted). Strict scrutiny is triggered by the *means* the State chooses. Here, to protect children, Respondent has "effectively suppresse[d] a large amount of speech that *adults* have a constitutional right to receive and to address to one another." *Reno*, 521 U.S. at 874 (emphasis added).

2. Respondent argues that, *even if* "complete suppression" of commercial speech promoting an idea is subject to strict scrutiny, the regulations here are subject to "the intermediate level of scrutiny traditionally associated with various forms of 'time, place, and manner' regulations." Resp. Br. 31. The Court has made clear, however, that regulations cannot be sustained as "time, place, and manner" restrictions unless they are content-neutral. The Court applies the *same* requirement to restrictions on commercial speech. *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 428-30 (1993); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 69 n.18 (1983). The Court's disposition of a similar "zoning" argument in *Reno* is therefore controlling. In *Reno*, the Government argued that restrictions on Internet access to indecent speech were "cyberzoning" and thus mere "time, place, [or] manner" regulations. The Court rejected this argument, precisely because the restrictions were not "content neutral." 521 U.S. at 868. The same rule applies here. *Linmark Assoc., Inc. v. Willingbro Tp.*, 431 U.S. 85, 94 (1977).[7]

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[7] Nor can the regulations be deemed content-neutral under a "secondary effects" theory. Here, as in *Reno*, the avowed "purpose of the [regulations] is to protect children from the primary effect[]" of the speech, *i.e.*, from the message itself; such a "content-based blanket restriction on speech cannot be 'properly analyzed as a form of time, place, and manner regulation.'" 521 U.S. at 868 (citation omitted).

3. Contrary to Respondent's contention, the State has not merely regulated the characteristics of commercial speech that justify "'depriving it of full First Amendment protection.'" Resp. Br. 32 (quoting *R.A.V.*, 505 U.S. at 388-89).

a. The State's greater power over commercial speech is a concomitant of its authority to regulate the transactions proposed in the advertising. *See, e.g., Edenfeld v. Fane*, 507 U.S. 761, 767 (1993); *see also 44 Liquormart*, 517 U.S. at 498-500 (plurality). The integrity of commercial bargains depends upon the information available to the parties; the State's power to "preserve a fair bargaining process" therefore includes the power to proscribe false and misleading claims about a product, as well as the power to require disclosure of "additional information, warnings, and disclaimers." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 772 n.24 (1976); *44 Liquormart*, 517 U.S. at 498. Particular methods or devices may present similar concerns about undue influence, overreaching, or harassment. *See, e.g., Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 630 (1995) (direct-mail solicitation within 30 days of an accident); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 462 (1978) (lawyer's in-person solicitation in hospital room). And the power to prohibit certain transactions includes the power to prohibit speech that solicits those illegal transactions. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977).

The Court has insisted, however, that the State's power over commercial *transactions* does not give it authority to suppress disfavored messages simply because they appear in commercial speech. *44 Liquormart*, 517 U.S. at 501; *R.A.V.*, 505 U.S. at 388-89; *Linmark*, 431 U.S. at 96; *Carey*, 431 U.S. at 701 & n.28. Thus, the State may not use its power over the "commercial aspect" of truthful speech to ban "the substance of the information communicated." *Linmark*, 431 U.S. at 96.

b. As the case comes to this Court, the State does *not* defend the regulations on the ground that they merely regulate

speech that is false and misleading. Rather, Respondent argues that even if pro-tobacco speech is nonmisleading, the State has the power to prohibit adult speech on the ground it might unduly influence minors. Resp. Br. 33.

The flaw in Respondent's theory is that it rests, not on the alleged "undue influence" of any particular advertising device or method, but on the alleged undue influence of *ideas*. Although Respondent complains that Petitioners' advertising is "rich in images with youthful appeal," Resp. Br. 33, nothing in the regulations purports to proscribe only images with uniquely distinctive appeal to children, while leaving open other speech to adults. *Cf.* JA 260 (MSA provision forbidding use of "cartoons" in cigarette advertising). The regulations largely exclude from the public square any "pro-tobacco" idea, *no matter how or to whom expressed*. On the theory that any remotely positive reference to tobacco products is harmful for children, the regulations bar even the most unimaginative messages — such as signs displaying brand names, tar or nicotine levels, length, or price. Indeed, Petitioner Peretti in No. 00-597 notes that the regulations will require it to remove the sign on its century-old store near Boston Common — the offending speech: "Tobacconist."

Nor do the regulations focus on the "undul[y] influenti[al]" device of "heavily promoting" tobacco products "near schools and playgrounds." Resp. Br. 32. The applicability of the restrictions does not turn on whether tobacco is "heavily promoted" in a given area: the regulations forbid even a single publicly displayed advertisement, even a pre-printed retail door sign with the Marlboro logo and the words "Push to open."

Respondent repeatedly characterizes the regulations as applying only "near" playgrounds and schools. But this is rhetoric, not reality. The regulations' undisputed effect is to eliminate all outdoor tobacco advertising in up to 91% of major metropolitan areas. The forbidden zones are thus "near" schools and playgrounds only in the sense that *everything* in an

urban area is near schools and playgrounds. This is not a case where the State has enacted a regulation that has a *de minimis* effect on adult speech — prohibiting tobacco advertising, for example, only in locations uniquely dedicated to children (such as schoolyards, little league fields, or high school newspapers).[8]

Respondent contends that application of strict scrutiny would grant tobacco companies a First Amendment right to target children in their advertising. Resp. Br. 32-35; U.S. Br. 28-30. This is nonsense.[9] Solicitation of unlawful sales is not protected, *see Bates*, 433 U.S. at 384, and Petitioners do not contend otherwise. But not every favorable tobacco message that may be publicly seen by a child constitutes "solicitation" of an illegal sale. The State's power to ban solicitation does not give it the far broader power to ban *any* speech that, in the State's view, might ultimately cause any minor to seek an unlawful sale. Indeed, *Carey* rejected just such an argument.

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[8] For similar reasons, Respondent cannot avoid strict scrutiny simply because the State's suppression is not yet total. *See Playboy*, 529 U.S. at 812 ("[i]t is of no moment that the statute does not impose a complete prohibition"); *id.* at 812-13 (regulations that effectively silence the speech for "two-thirds of the day" are tantamount to a "blanket ban").

[9] The Government's parade of horribles ignores the fact that the state *may* regulate the characteristics of commercial speech that justify "depriving it of full First Amendment protection." *R.A.V.*, 505 U.S. at 388-89. The state may regulate *misleading* speech (*e.g.*, 15 U.S.C. § 1336); require *disclosures* about a product (*e.g.*, 21 U.S.C. § 343(r)); and regulate even fully protected speech in pursuit of interests (*e.g.*, personal privacy, 15 U.S.C. §§ 1681, 6501) unrelated to suppression of ideas. *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968). The only non-frivolous question posed by the Government concerns FCLAA's ban on cigarette advertising on television and radio, 15 U.S.C. § 1335. *See* U.S. Br. 28. The question, however, is largely hypothetical, because Petitioners voluntarily agreed to eliminate all television and radio advertising *before* the ban was enacted 31 years ago, have never challenged the ban, and have no intention of doing so. At any rate, the validity of such advertising regulations turns in large measure on "the special problems of the electronic broadcast media," which are not in this case. *Virginia State Bd.*, 425 U.S. at 773.

In *Carey*, the State argued it could ban contraceptive advertisements because they would "legitimize sexual activity of young people." 431 U.S. at 701. In rejecting this contention, the Court explicitly distinguished between advertisements that "*directly* incited illicit sexual activity among the young" and general advertisements aimed at adults. *Id.* (emphasis added). The Court held that the State could not ban the *latter* unless it was able to satisfy the strictest level of scrutiny—namely, that the advertisements could "be characterized as 'directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action.'" *Id.* (citation omitted).[10] Similarly, the State's power to ban advertising aimed at "directly incit[ing]" minors to smoke does not give it the more sweeping authority to ban generic advertisements that the State thinks might ultimately cause some adolescents to want to smoke. Regulations, such as those here, which rest on this latter basis are, as *Carey* suggests, subject to strict scrutiny.

B. The Regulations Fail the *Central Hudson* Test

1. Respondent contends that his burden on the "directly advances" element should be relaxed, because "human experience" suggests a connection between advertising and the initiation of smoking. Resp. Br. 39-40. This Court has observed, however, that it is equally fair to assume that advertising merely shifts existing demand among brands. *See Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 189 (1999). In any event, Respondent has failed to meet his burden, either on the record below, or with his improper

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[10] Respondent and his *amici* contend that *Carey* is limited to a complete suppression of advertising for "constitutionally protected" products. Resp. Br. 44; U.S. Br. 29. *Carey* made clear that its analysis turned *not* on these features, but on more fundamental principles: the statute was invalidated because it was "clearly directed not at any commercial aspect of the prohibited advertising but at the ideas conveyed and form of expression — the core of First Amendment values." 431 U.S. at 701 n.28.

supplements before this Court. He has offered no evidence — no study, no expert testimony, nothing — establishing that, on top of the extensive restrictions already in the MSA, these regulations will have any significant *additional* effect in reducing illegal sales or underage smoking.

2. Respondent and the Government maintain that the regulations are not "more extensive than necessary" because they leave alternative channels of communication. Resp. Br. 43; U.S. Br. 24-25. As the First Circuit acknowledged, however, vendors seeking to advertise the availability of Petitioners' products in their stores have *no* meaningful alternative to outdoor signs. Pet. App. 33a. Tobacco advertisements on television and radio are prohibited by federal law. *See* 15 U.S.C. § 1335. Newspaper and magazine advertising is not only prohibitively expensive, but also less effective; consumers who read such advertisements will often be nowhere near the store in question. The fact that the regulations permit tobacco retailers to post outdoor signs in the remaining 10% of their metropolitan areas does not ameliorate the regulations' silencing effect. U.S. Br. 30. Local merchants use signs to reach potential customers *in the neighborhood*. Signs posted in remote locations cannot attract persons passing stores by vehicle or foot.[11] The regulations do not provide a reasonable opportunity for reaching these lawful customers. *Went for It, Inc.*, 515 U.S. at 633-34 (30-day limitation on direct mail to victims leaves "ample alternative channels").

The lower courts' analysis of this issue cannot be reconciled with *Linmark*, *supra*. There, the Court invalidated a restriction on home "For Sale" signs, because the remaining options for home-sellers were "far from satisfactory." 431 U.S. at 93. The only realistic alternatives were newspapers and real estate

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[11] On top of all this, "oral" communications are also barred. Pet. App. 107a. Thus, a shop owner standing in front of his store would be forbidden to answer a passing adult who asks if cigarettes are sold there.

agents, which cost more and were "less likely to reach persons not deliberately seeking sales information." *Id.* So here.

3. If the burden created by the regulations on outdoor advertising addressed to adults is constitutionally "incidental," then "narrow" tailoring means nothing. The broad reach of the restrictions is not minor, insignificant, or unintended. The regulations ban pro-tobacco advertising in 90% of the State's most populated areas.[12] The regulations bar outdoor speech wherever adults are likely to be found, preventing adults from receiving tobacco-related messages when they are out and about in the public square, not just when they are in or "near" schools and playgrounds.

Although Respondent conceded below that the 1,000-foot limit was based on the distance from which it is possible to read a *billboard*, Pet. App. 80a-81a, he applied this same distance uncritically to *all* outdoor advertisements regardless of size.[13] To be sure, Massachusetts *says* it "carefully calculated" the 1,000-foot zone's "costs and benefits," but saying it does not make it so. *See Greater New Orleans*, 527 U.S. at 188.

Bolger and *Carey* make clear the State cannot so broadly ban adult speech in order to shield children. *See Carey*, 431 U.S. at 701; *Bolger*, 463 U.S. at 74. The Government points out that *Bolger* emphasized the ability of parents to control children's exposure to mailed contraceptive advertisements —

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[12] Respondent's claim that the Court may not consider the practical effect of a speech restriction in a facial challenge is frivolous; this Court has consistently considered the practical reach of commercial speech restrictions in facial challenges, *see, e.g., Linmark*, 431 U.S. 93, and *Central Hudson*'s requirement that restrictions be "no more extensive than is necessary" requires just this kind of inquiry, *see, e.g., Went For It*, 515 U.S. at 633-34.

[13] By contrast, the State bans bars only within 500 feet of a school, and permits bars even closer if "the premises are not detrimental to the educational . . . activities of said school." Mass. Gen. Laws ch. 138, § 16C.

control the Government contends is not possible here. U.S. Br. 27 n.10. This argument shows only that there is even *less* justification for the restrictions here. The reason why *Bolger* mentions parental control is because one of the harms the State sought to protect against was *any* exposure of children to the sexually explicit images and messages themselves. Respondent has not suggested and cannot suggest that parents feel a similar need to shield their children's eyes whenever they pass a sign that says "tobacco sold here." The State does not contend that there is anything traumatic, frightening, or psychologically wounding for children in the words or images of tobacco advertisements themselves.[14]

4. Respondent does not deny that the regulatory alternatives identified by Petitioners may reduce underage smoking. Respondent contends, however, that the State need not pursue such options, because "[e]ven perfect enforcement of the tobacco sales law" would not stop children who want cigarettes from getting them. Resp. Br. 47-48. This Court has never suggested that the State may turn to speech restrictions whenever other enforcement mechanisms will fail to ensure *perfect* compliance with state law.

In any event, the State may not enact speech restrictions if direct regulation of conduct "could advance the Government's asserted interest in a manner less intrusive to . . . First Amendment rights." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 491 (1995). That rule applies here. Massachusetts has yet to implement some undisputedly available regulatory options (*e.g.*, state-wide licensing requirements for retailers),

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[14] Contrary to Respondent's claim (Resp. Br. 45 n.25), petitioners need not rely on the "overbreadth" standing doctrine, which "enables persons who are themselves unharmed by the defect in a statute" to challenge it based upon the First Amendment rights of third parties. *See Bd. of Tr. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 484 (1989). It is undisputed that the Regulations "act[] directly against the promotional activities of [Petitioners]." *Central Hudson*, 447 U.S. at 565 n.8.

has only recently implemented other measures (*e.g.*, strict identification requirements), and has room to step up enforcement of still other measures (*e.g.*, prohibitions against smoking on school grounds). Because the State's ultimate concern is with conduct, and the State has such a wide range of alternatives to address that conduct, the First Amendment bars it from turning to broad bans on speech. *See 44 Liquormart*, 517 U.S. at 512 (plurality) ("speech restrictions cannot be treated as simply another means that the government may use to achieve its end"). Here, as elsewhere, the constitutionally preferred antidote to disfavored speech is *more speech*.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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